

1-22-2010

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Recommended Citation

Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 Loy. L.A. Int'l & Comp. L. Rev. 19 (2010).
Available at: <http://digitalcommons.lmu.edu/ilr/vol32/iss1/2>

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International Wrongs, State Laws and Presidential Policies

MICHAEL D. RAMSEY*

In *Movsesian v. Victoria Versicherung AG*,¹ the Ninth Circuit invalidated a California law on the grounds that it conflicted with, and therefore was preempted by, the President's foreign policy. In the comments below, I suggest that this decision is counter to the Supreme Court's 2008 decision in *Medellín v. Texas*² and conflicts with basic principles of U.S. constitutional law. More broadly, I will consider the effect of presidential policies on state laws that, like the California law at issue in *Movsesian*, seek to provide or promote remedies for international wrongs.

Movsesian invalidated California Code of Civil Procedure Section 354.4, which provides jurisdiction and an extended statute of limitations for California residents to bring insurance claims arising out of the unrest in the Ottoman Empire between 1915 and 1923. This unrest principally targeted ethnic Armenians and has been described as a genocide against the Armenian community. That designation, though, is deeply contested, especially by the current government of Turkey. The California statute adopted the phrase "Armenian Genocide victim" as a statutory definition for persons who had suffered injuries during the period, but in fact no legal consequence turned upon the statute's use of this phrase, and

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1. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009).

2. *Medellín v. Texas*, 552 U.S. 491 (2008).

the victims to whom the statute extended protection were those of "Armenian or other ancestry."³ Nonetheless, the Ninth Circuit held that because the federal executive branch had resisted congressional efforts to label the events in the Ottoman Empire a genocide, the California statute's use of that term caused the entire statute to be preempted.⁴

As I will describe below, *Movsesian's* result gives extraordinary and unconstitutional preemptive power to the President. The issue has broad implications. Presidential policies can be formulated and announced easily and unilaterally, with few if any procedural checks or input from other branches. They can be stated broadly and ambiguously, and courts are likely to defer to subsequent interpretations of them by the executive branch. Further, as shown by *Movsesian* itself, courts in cases of doubt are likely to invalidate the state law in its entirety rather than search for ways to reconcile the two. In effect, then, the *Movsesian* principle would give the President supervisory power over state law, with authority to displace a broad range of state laws the President finds inconvenient. This result is contrary to the Constitution's designation of Congress, not the President, as the nation's lawmaking body, and to the Constitution's designation of treaties and statutes, but not presidential policies, as the "supreme Law of the Land."

Movsesian's result is also inconsistent with the U.S. Supreme Court's decision in *Medellín*. Though the *Movsesian* court gave *Medellín* only slight attention, *Medellín* involved the same issue—a claim that presidential foreign policy should preempt inconsistent state law. The Court in *Medellín* ruled firmly against the President, even though it found the foreign policy implications invoked by the President to be "plainly compelling."⁵ The simple and determinative constitutional rule, the Court held, is that the President is not a lawmaker.

I. BASIC PRINCIPLES

The Constitution sets forth two basic principles of separation

3. CAL. CIV. PROC. CODE § 354.4 (West 2009).

4. *Movsesian*, 578 F.3d at 1063.

5. *Medellín*, 552 U.S. at 524.

of powers and federalism that govern our discussion. First, state law applies unless it is displaced by federal law. Second, the President does not make federal law.

Under the first principle, federal law can displace state law in two ways: if the Constitution itself excludes a state from acting, or if an act of federal lawmaking overrides the state law. The Constitution either expressly or implicitly prohibits the states from engaging in certain activities. Article I, Section 10, for example, lists certain actions the states cannot take, or can take only with Congress' consent, such as engaging in war or making treaties and other international agreements.⁶ Further, some (though not all) constitutional grants of power to branches of the federal government may be exclusive (that is, by negative implication they exclude the states from acting even if no conflicting federal lawmaking has taken place). The dormant commerce clause doctrine, which excludes states from certain kinds of regulation of interstate commerce even in the absence of federal legislation is an important though controversial example.⁷

Absent a constitutional prohibition, state law is valid unless displaced by federal law. Article VI sets forth the preemptive categories of federal law: statutes passed "in Pursuance" of the Constitution and treaties made "under the Authority of the United States." Notably, these provisions impose material procedural hurdles to the creation of federal law. It must be created (a) with the approval of majorities of both of the two separately-elected

6. U.S. CONST. art. I, § 10.

7. See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987). It is important to distinguish executive preemption, as adopted in *Movsesian*, from the related idea that states may be constitutionally precluded from certain foreign affairs activities by the Constitution's assignment of foreign affairs powers to the national government. The U.S. Supreme Court expressed the latter proposition in *Zschernig v. Miller*, 389 U.S. 429 (1968), although it has been sharply criticized. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999). But see Carlos Manuel Vázquez, *W(h)ither Zschernig*, 46 VILL. L. REV. 1259 (2001) (offering a partial defense). *Zschernig* held that some state laws implicating foreign affairs are unconstitutional even where there has been no federal action (somewhat in the manner of the dormant commerce clause). Executive preemption, in contrast, holds that otherwise-constitutional state laws become invalid to the extent they conflict with existing executive foreign policy.

houses of Congress and of the President, (b) with a supermajority of both houses, or (c) in the case of treaties, with the approval of the President plus a supermajority of the Senate. Through this structure, the President's lawmaking authority is exercised only in conjunction with one or both of the houses of Congress.

Thus, the second principle arises from the first: the President alone cannot invoke either of the lawmaking avenues of Article VI. More fundamentally, Article II, Section 1's designation of the President as holder of the "executive Power" shows the office's lack of independent lawmaking authority. In eighteenth-century terms, "executive" power was understood specifically in contrast to "legislative" power, the power to make law. In England, the king held the executive power, but a bedrock principle of eighteenth-century English law was that the king, standing alone, was not a lawmaker.⁸ As James Madison put it in *Federalist No. 47*, in England "[t]he magistrate in whom the whole executive power resides cannot of himself make a law."⁹

These basic principles came together in the U.S. Supreme Court's most celebrated case on presidential power, *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁰ In that case, President Harry Truman famously directed federal seizure of major U.S. steel mills when an impending strike threatened interruption of military supplies to the war effort in Korea. The Court found the President's order to be an unconstitutional lawmaking act.

Justice Hugo Black's opinion for the majority assumed the first principle: that state law governed unless displaced by federal law. The mill owners held property rights under state law. In the absence of a conflicting federal act, the state law was obviously constitutional and formed the baseline of rights to which the mill owners could appeal. The question in the case was whether any federal act displaced the state law. Since there was no conflicting treaty or act of Congress, the question became whether the President's order had that effect.

Black held that it did not, applying the second principle—the

8. MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 91-114 (2007) [hereinafter RAMSEY, *THE CONSTITUTION'S TEXT*]; see 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 142-43, 261 (1765).

9. *THE FEDERALIST* No. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987).

10. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

President was not a lawmaker. As he stated:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States"¹¹

Black's opinion, though majestic in its simplicity, did not quite explain one key point. Black did not say *why* he regarded the President's act as a lawmaking act. He wrote that "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President,"¹² thus equating policymaking with lawmaking. But that explanation is plainly incomplete. Especially in foreign affairs, the President routinely makes presidential policy that is not Congress' policy, and then implements it in various ways. For example, most diplomatic communications are within this description: the President decides what message should be communicated to foreign nations and then directs his diplomats to communicate it.¹³ There is, though, an obvious explanation, and Black likely had it in mind without expressing it. The President's action in *Youngstown*, unlike the President's routine diplomacy, changed the existing law. Once we see state law as the baseline (as, constitutionally, it is), we can see that the mill owners had a legal right which the President sought to alter.

Black's failure to make this clear may have been the inspiration for two celebrated concurrences in *Youngstown* that regarded Black's opinion as overly simplistic and which over time have gained as much or more prominence than Black's own opinion. First, Justice Felix Frankfurter famously argued that longstanding practice among the branches may create a "gloss" upon the Constitution's text, and thus that Black's purely textual

11. *Id.* at 587-88.

12. *Id.* at 588.

13. For further discussion of this point, see RAMSEY, THE CONSTITUTION'S TEXT, *supra* note 8, at 52-53.

argument might in some cases need refinement.¹⁴ Second, even more famously, Justice Robert Jackson argued that the constitutionality of a presidential action should turn to some extent on whether Congress had approved, disapproved, or remained silent. In implementing his three-part evaluation, Jackson contemplated assessing not only enacted statutes, but also Congress' more general and informally expressed sense of the matter.¹⁵

Neither concurrence undermined Black's basic point. There was no longstanding practice of Presidents altering domestic property rights by decree,¹⁶ nor was there any indication that Congress approved of the President's act (in fact, according to Jackson, there was evidence that Congress disapproved).¹⁷ Both Jackson and Frankfurter can best be understood as seeking to preserve flexibility in other policymaking areas, especially in foreign affairs, where Presidents had acted and continued to act without an express statutory policy behind them.

In sum, the constitutional problem in *Youngstown* was not that the President independently formulated policy (something the President does all the time) but that the President tried to make that policy superior to existing law. Both Article II and Article VI show this to be beyond the President's power. The President, like the eighteenth-century English monarch, cannot use the executive power to issue decrees with the force of law. Article VI confirms this limit by setting forth the ways the federal government can act with the force of law, and confining the President's role to action in conjunction with one or both of the legislative branches.

II. MEDELLÍN AND THE PRESIDENT'S FOREIGN AFFAIRS POWER

Youngstown, one might say, was a domestic law case (although it took place against the background of the Korean

14. *Youngstown*, 343 U.S. at 589-90.

15. *Id.* at 635-36.

16. Thus Frankfurter wrote that "[a]lthough the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice BLACK has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case." *Id.* at 589.

17. *Id.* at 639.

War), and perhaps different principles should apply in foreign affairs. In *Medellín v. Texas*, however, the Supreme Court applied the basic principles underlying *Youngstown* to presidential foreign policy preemption. Relying heavily on *Youngstown*, the Court refused to give a presidential foreign policy preemptive effect over conflicting state law. In doing so, the Court reaffirmed that these basic principles do not apply differently merely because the dispute involves foreign affairs.

In simplified form, *Medellín* involved the effect in U.S. domestic law of a ruling by the International Court of Justice (ICJ), “the principal judicial organ of the United Nations.”¹⁸ A treaty to which the United States is a party, the Vienna Convention on Consular Relations (VCCR), requires that when nations (including sub-national units such as U.S. states) arrest foreign citizens, they allow the arrested person to contact that person’s embassy or consulate.¹⁹ This protection was until recently routinely disregarded by state and local authorities in the United States, presumably because they were unaware of it. In particular, the state of Texas disregarded it in the case of José Medellín, a Mexican national arrested, convicted and sentenced to death for a horrific double murder in Houston. After conviction and sentencing, Medellín objected that Texas had failed to inform him of his rights under the VCCR. The Texas courts denied relief on the ground that the objection had come too late and state law therefore did not allow him to raise it.²⁰

Meanwhile, Mexico began international proceedings on behalf of Medellín and other Mexican nationals similarly situated. In response to Mexico’s protests, the United States took the position that while the VCCR had indeed been violated in Medellín’s case, Medellín had (as the Texas courts said) waived his rights by failing to object, and further, the violation did not create in Medellín a personal right to have his sentence reexamined. The VCCR contains an optional protocol, to which the United States was then a party, allowing the ICJ to resolve disputes over its meaning.²¹ After the United States rejected Mexico’s diplomatic

18. U.N. Charter art. 92.

19. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

20. *Medellín v. Texas*, 552 U.S. 491, 500-03 (2008).

21. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24,

overtures, Mexico filed suit against the United States in the ICJ on behalf of its nationals. In *Case Concerning Avena and Other Mexican Nationals* (known as *Avena*), the ICJ rejected the U.S. position and directed that Medellín's case be reexamined.²²

President George W. Bush thereafter issued a memorandum directing that state courts implement the ICJ decision by reexamining the convictions and sentences of the persons affected by the *Avena* decision (including Medellín). In the memorandum, the President stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.²³

Texas, however, refused to comply with either the ICJ decision or the President's memorandum, a position upheld by the Texas Court of Criminal Appeals, again on the ground that Texas law prohibited Medellín from raising a belated VCCR objection.²⁴ Thus, as the case came to the U.S. Supreme Court, the twofold question was whether either the ICJ decision or the President's memorandum overrode Texas law's procedural bar against late objections.

The Court, per Chief Justice John Roberts, first rejected the argument that the ICJ decision was preemptive of its own force. Article 94 of the United Nations Charter bound the United States to implement decisions of the ICJ (thus creating an international obligation on the United States).²⁵ But the Court held that Article

1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

22. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 56-57, 72 (Mar. 31). The ICJ directed the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals," and indicated that state procedural bars should not prevent such review and reconsideration. *Id.*

23. *Medellin*, 552 U.S. at 503.

24. *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

25. U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.").

94 was not self-executing (that is, it had no direct effect in U.S. domestic law) under the doctrine of *Foster v. Neilson*.²⁶ Although that conclusion may have been mistaken, either under the Constitution's original understanding or under the best reading of *Foster*,²⁷ its effect was that Texas law was not preempted by any Article VI source of federal law.

That left the President's memorandum as a possible source of preemption. The President, who agreed with the Court's assessment of Article 94, nonetheless argued that while the treaty was not self-executing of its own force, his policy of implementing it displaced any conflicting state law.²⁸ Thus, Texas could not rely on its procedural bar; not because it conflicted with the ICJ decision, but because it conflicted with presidential foreign policy as set forth in the memorandum. As the President's brief put it, the President had power in foreign affairs to "establish binding rules of decision that preempt contrary state law."²⁹

The Court flatly rejected the idea that the President had power to convert a non-self-executing treaty into a binding domestic legal obligation. Roberts' opinion tied the question directly to the question of presidential lawmaking powers. As Roberts put it:

Once a treaty is ratified without provisions clearly according it domestic effect . . . whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "[t]he power to make the necessary laws is in Congress; the power to execute in the President." *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006) (quoting *Ex parte Milligan*, 4 Wall. 2, 139

26. *Medellin*, 552 U.S. at 503-23; see *Foster v. Neilson*, 27 U.S. 253 (1829). As the *Medellin* Court explained, "while treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms." *Id.* at 505 (internal quotations omitted).

27. See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); David L. Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); see also *Medellin*, 552 U.S. at 538-39 (Breyer, J., dissenting) (disagreeing with the Court on this point). But see Ernest A. Young, *Treaties as "Part of Our Law"*, 88 TEX. L. REV. 91, 107-136 (2010) (defending *Medellin*'s non-self-execution holding).

28. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984), 2007 WL 1909462 [hereinafter U.S. *Medellin* Brief].

29. *Id.* at 5.

(1866) (opinion of Chase, C.J.)); see U.S. Const., Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"). As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, § 7.³⁰

Thus, the Court's explanation proceeded in two steps: (1) converting a non-self-executing treaty into a domestic legal obligation that preempts state law is a lawmaking act; and (2) the President is not a lawmaker. This approach follows directly from Black's opinion in *Youngstown*, which Roberts cited directly, quoting Black's aphorism that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."³¹ Roberts also invoked Madison's *Federalist No. 47* (which observed that "[t]he magistrate in whom the whole executive power resides cannot of himself make a law").³² But, Roberts continued, "[t]hat would, however, seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty."³³

Like *Youngstown*, *Medellín* reaffirms the basic constitutional principles described above. In the absence of a conflicting federal act, Texas' procedural bar was plainly constitutional and formed the legal baseline of *Medellín*'s rights. Article 94, combined with the ICJ judgment in *Avena*, would have altered that legal baseline in accordance with Article VI had Article 94 been a valid self-executing treaty obligation. But once the Court concluded that it was not self-executing, no Article VI law conflicted with Texas'

30. *Medellín*, 552 U.S. at 526.

31. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)). Roberts also applied Justice Jackson's three-part *Youngstown* analysis, finding that Congress had not acquiesced in the President's execution of ICJ judgments, and indeed that the non-self-executing status of the treaty placed the situation in Jackson's third category of congressional disapproval. *Id.* at 1370-71.

32. THE FEDERALIST NO. 47 (James Madison), *supra* note 9, at 303. In *Federalist No. 47*, Madison was actually speaking of the English system, but clearly he was equating it to the U.S. constitutional system in this respect.

33. *Medellín*, 552 U.S. at 528.

rule. The question, as the Court plainly and correctly understood, was whether the non-Article VI presidential foreign policy could have preemptive effect. The Court held it could not, notwithstanding the President's power in foreign affairs and the importance to U.S. foreign affairs of complying with *Avena* (an interest that the Court found to be "plainly compelling").³⁴ The simple constitutional proposition underlying the Court's conclusion is – as Black said in *Youngstown* and the Court repeated in *Medellín* – that the President is not a lawmaker.

III. INTERVENING CASES: THE ROAD FROM *YOUNGSTOWN* TO *MEDELLÍN*

The President further argued in *Medellín* that, notwithstanding the basic propositions set forth above, intervening case law recognized the President's power to displace state law as needed to resolve disputes with foreign nations.³⁵ This section considers those cases to see if they provide reasons to change our basic assessment of the Constitution and of *Medellín*'s holding. As set forth below, to the contrary they (and *Medellín*'s treatment of them) confirm it.

In 1981, the Court gave preemptive effect to a unilateral executive agreement³⁶ in *Dames & Moore v. Regan*.³⁷ President Carter had previously concluded the Algiers Accords with Iran, ending the Tehran hostage crisis. Among other things, the United States agreed in the Accords to terminate claims pending in U.S. courts against Iran and transfer them to an international arbitral tribunal. *Dames & Moore* had a state-law claim against Iran and a pre-judgment attachment on Iranian assets. President Reagan, upon succeeding Carter, issued an executive order that terminated *Dames & Moore*'s claim.³⁸ At the Supreme Court, the case posed the question whether Reagan's order displaced the state law. The Court found that it did.

34. *Id.* at 524.

35. *Id.* at 530.

36. That is, an international agreement concluded on behalf of the President without the formal approval of either Congress or a supermajority of the Senate. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 219-24 (2d ed. 1996).

37. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

38. *Id.* at 664-65.

In a sense, *Dames & Moore* replayed *Youngstown* with an opposite result. But there were two important differences. First, Reagan's order rested upon the Algiers Accords, an executive agreement. Executive agreements of course are not part of Article VI's list of preemptive federal laws. Nonetheless, in two pre-*Youngstown* cases, *United States v. Belmont* and *United States v. Pink*, the Court had given preemptive effect to an executive agreement that conflicted with state law. Although executive agreements were not technically Article II treaties, the Court concluded, they should be given the same status.³⁹

The Court in *Dames & Moore* might have rested simply on *Pink* and *Belmont*. But those cases had been decided in an earlier era, on the express or implied authority of *United States v. Curtiss-Wright Export Co.*, a 1936 decision that announced broad extraconstitutional presidential authority in foreign affairs.⁴⁰ In *Youngstown*, Justice Black had firmly declared—in open rebuke of *Curtiss-Wright*—that all presidential powers had to be grounded either in the Constitution or a federal treaty or statute.⁴¹ No Justice concurring or dissenting in *Youngstown* challenged this proposition. Though the specific result of *Pink* and *Belmont* might be defended on the ground that these cases involved the President's specific constitutional power of recognizing foreign governments,⁴² their broader claims about presidential power might need to be rethought.

Thus, in addition to the executive agreement, the Court in *Dames & Moore* focused on the second key difference between that case and *Youngstown*. "Crucial to our decision today," Justice William Rehnquist wrote, "is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."⁴³ As the Court explained, there was a long pattern of congressional acquiescence in presidential settlement agreements. These settlements dated to early post-ratification practice, and

39. *United States v. Pink*, 315 U.S. 203, 229-30 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

40. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WILLIAM & MARY L. REV. 379 (2000) (describing and criticizing this aspect of the case).

41. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

42. See HENKIN, *supra* note 36, at 219-22.

43. *Dames & Moore*, 453 U.S. at 680.

they had very often been done by executive agreement. Congress had frequently enacted legislation to implement unilateral executive settlement agreements, and it had not objected to the President's practice.⁴⁴ The Court invoked Jackson's *Youngstown* concurrence, finding that the case fell into Jackson's category of presidential acts with congressional approval—which, Jackson had said, would almost always be constitutionally defensible.⁴⁵ As a result, the Court in *Dames & Moore* made clear that its holding was narrow and that congressional approval was central to it: "In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area . . . and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims...."⁴⁶

Dames & Moore may be criticized on various grounds. Just two years later, the Court held in *INS v. Chadha* that Congress must act formally in accordance with Article I, Section 7's bicameralism and presentment clauses if it wants to alter legal rights.⁴⁷ And even if Congress' informal acquiescence would suffice to convey power on the President, it was dubious whether Congress had acquiesced to *preemptive* presidential settlements. The long historical record the Court invoked did not (aside from the single agreement at issue in *Pink* and *Belmont*) involve settlements that displaced state law.⁴⁸ But even taken on its own terms, *Dames & Moore* does not suggest a broad view of presidential preemptive power, and indeed it arguably cuts back on the sweep of *Pink* and *Belmont* by focusing on congressional approval in the specific context of claims settlement agreements.

That conclusion is supported by the Court's next major case in the field, *Barclays Bank PLC v. Franchise Tax Board*.⁴⁹ *Barclays* was a challenge to California's method of calculating state taxes for multinational enterprises, called "worldwide combined reporting," which was different from most other jurisdictions and

44. *Id.* at 680-81.

45. *Id.* at 686. The Court also invoked Frankfurter's *Youngstown* suggestion that longstanding practice might provide a "gloss" on the text. *Id.*

46. *Id.*

47. *INS v. Chadha*, 462 U.S. 919 (1983).

48. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) [hereinafter Ramsey, *Executive Agreements*].

49. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

much more favorable to the state. The multinational corporate petitioner, supported by an array of foreign governments,⁵⁰ challenged the tax as unconstitutional, in part because the executive branch had opposed it and found it to interfere with executive conduct of foreign affairs.

The Court, however, emphasized that Congress was the lawmaker with respect to foreign commerce, and while Congress had considered proposals to override California's tax, it had ultimately declined to act. Preemption, the Court insisted, comes from Congress. What the petitioner corporation wanted⁵¹ was executive preemption, which the Constitution does not recognize. Justice Ruth Bader Ginsburg explained for the majority:

[Petitioner] points to a series of Executive Branch actions, statements, and *amicus* filings . . . [and contends] that, taken together, these Executive pronouncements constitute a "clear federal directive" proscribing States' use of worldwide combined reporting.

The *Executive* statements to which [petitioner] refers, however, cannot perform the service for which [petitioner] would enlist them. The Constitution expressly grants Congress, not the President, the power to "regulate Commerce with foreign Nations. . . ."

. . . Executive Branch actions—press releases, letters, and *amicus* briefs—on which [petitioner] here relies are merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting.⁵²

By 1998, the executive branch appeared to acquiesce in Ginsburg's view. *Breard v. Greene*,⁵³ decided that year, involved facts very similar to *Medellín*. Breard, a Paraguayan citizen, had been convicted of murder and sentenced to death in Virginia. He

50. *Id.* at 324 n.22.

51. The President argued that while a clear presidential position would have the effect for which the petitioner contended, that position had not been sufficiently established at the time of relevant events in the case. *Id.* at 330 n.32 (explaining the executive branch position).

52. *Id.* at 328-30 (footnotes omitted) (citations omitted).

53. *Breard v. Greene*, 523 U.S. 371 (1998); see Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999).

belatedly objected that he had not been allowed to contact his consulate, in violation of the VCCR. The relevant state and federal courts upheld the sentence and conviction on the basis of Virginia's procedural bar on untimely objections. Paraguay, like Mexico after it, took the case to the ICJ under the VCCR's optional protocol. But unlike in *Medellín*, the ICJ case was still pending at the time of Breard's scheduled execution. The ICJ issued an order directing that the execution be stayed, but both the United States and Virginia denied that such an order was binding, and the Supreme Court appeared to assume (perhaps wrongly) that Virginia was under no Article VI duty to give Breard a remedy.⁵⁴ On these facts President Clinton admitted that he had no constitutional authority to interfere with the implementation of Virginia's laws, and could only *ask* the state to grant a stay. The U.S. brief conceded: "The measures at the United States' disposal under our Constitution may in some cases include only persuasion – such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution – and not legal compulsion through the judicial process. That is the situation here."⁵⁵

The Court apparently agreed, observing:

Last night the [U.S.] Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes [to do so] . . . that is his prerogative. But nothing in our existing case law allows us to make that choice for him.⁵⁶

The final case in this series—and the one invoked most heavily in *Movsesian*—is *American Insurance Association v. Garamendi*.⁵⁷ Prior to *Garamendi*, as we have seen, there was little

54. See Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998).

55. Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 AM. J. INT'L L. 666, 673 (1998) (quoting the U.S. brief in *Breard*, at 49-51) (internal quotations omitted); see also Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675 (1998) (discussing and endorsing the executive branch position).

56. *Breard*, 523 U.S. at 378.

57. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 394 (2003). For a critical account of the case and its implications, see Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825 (2004). For further structural criticism, see Bradford R. Clark, *Domesticating Executive Agreements*, 93 VA. L. REV. 1573 (2007); Michael P. Van Alstine,

textual or precedential support for executive preemption aside from executive agreements implicitly approved by Congress. *Garamendi* seemed to go much further, invalidating a California law that required insurance companies doing business in California to provide lists of policyholders to whom they had issued insurance prior to and during the Holocaust. The executive branch was in the process of negotiating settlements for Holocaust-era claims, including insurance claims. Executive agreements had been concluded with several key countries, including Germany, but these executive agreements did not clearly preempt California's law.⁵⁸

Justice David Souter reasoned for the majority that even if the executive agreements were not in themselves preemptive, they reflected a presidential policy that Holocaust-era claims should be resolved through the executive branch negotiations. Analogizing to the statutory preemption of state laws interfering with executive foreign policy in the recent decision in *Crosby v. National Foreign Trade Council*,⁵⁹ Souter held that the policies underlying the executive agreements in *Garamendi* had the same effect.⁶⁰

In dissent, Justice Ginsburg – sounding themes from her *Barclays* majority – rightly objected that *Crosby* was not at all on point because *Crosby* was a conventional Article VI preemption case: the whole difficulty in *Garamendi* was that no Article VI source of law existed. Ginsburg was willing to accept preemption by executive agreement so long as the preemptive intent and effects were clear, but she found the executive agreements in the particular case to lack clarity and was unwilling to recognize a broader version of executive foreign policy preemption.⁶¹

IV. MEDELLÍN AND GARAMENDI

Not surprisingly, the President's brief in *Medellín* relied

Executive Aggrandizement in Foreign Affairs Lawmaking, 54 UCLA L. REV. 309 (2006).

58. See Denning & Ramsey, *supra* note 57, at 860-62.

59. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). In *Crosby*, the Court found a Massachusetts law restricting companies from doing business in Burma to be preempted by a federal statute imposing similar but more limited and flexible sanctions on Burma. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175.

60. *Garamendi*, 539 U.S. at 423-28.

61. *Id.* at 430-43.

heavily on *Garamendi*. The *Garamendi* decision, the President argued, recognized that state law must give way to executive foreign policy, as the President contended it must also do in *Medellín*. Thus President Bush claimed the power, exercised through his memorandum, to “establish binding rules of decision that preempt contrary state law,” including the Texas procedural bar applied against *Medellín*.⁶² Indeed, in at least two respects *Medellín* was a better case for the President than *Garamendi*. First, the President was directly implementing the clear command of a treaty, Article 94 of the U.N. Charter. Although Article 94 was not (according to the President) preemptive of its own effect, the President was surely on stronger preemptive ground than in *Garamendi*, where there was no applicable treaty and only a group of ambiguous and loosely applicable executive agreements. Second, in *Medellín* the President had issued a formal statement calling for preemption. In *Garamendi*, Ginsburg’s dissent had distinguished between formal and informal executive actions, saying that the former had greater claims to be preemptive.⁶³ Although *Medellín* lacked an executive agreement, the President could claim greater formality on two fronts—the treaty itself and the President’s memorandum. Taken with the other cases recognizing the President’s power to settle claims (*Dames & Moore*, *Pink*, and *Belmont*), the President argued that “the Memorandum is a valid exercise of the President’s foreign affairs authority to resolve claims disputes with foreign nations.”⁶⁴

In response, the Court in *Medellín* (per Chief Justice John Roberts) limited *Garamendi* to its facts (and indeed, to a somewhat recast version of its facts). *Garamendi*, Roberts’ opinion began by saying, was one of “a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement.”⁶⁵ “The claims-settlement cases,” the Court continued, “involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or

62. U.S. *Medellín* Brief, *supra* note 28, at 5.

63. See *Garamendi*, 539 U.S. at 442–43.

64. *Medellín v. Texas*, 552 U.S. 491, 530 (2008).

65. *Id.* (citing *Garamendi*, 539 U.S. at 415; *Dames & Moore v. Regan*, 453 U.S. 654, 679–80 (1981); *United States v. Pink*, 315 U.S. 203, 229 (1941); *United States v. Belmont*, 301 U.S. 324, 330 (1937)).

foreign nationals.”⁶⁶ Moreover, according to the Court, those cases relied on congressional assent established by longstanding executive practice. Quoting *Dames & Moore*, Roberts continued: “[T]he limitations on this source of executive power are clearly set forth and the Court has been careful to note that ‘[p]ast practice does not, by itself, create power.’”⁶⁷ In short, *Garamendi*, like *Dames & Moore*, was about the power to make executive claims-settlement agreements with the tacit consent of Congress. As such, the Court maintained, *Garamendi* was not relevant to *Medellín*, where there was no executive agreement, where exercise of the President’s power was (leaving aside the executive agreement cases) unprecedented, and where there was no evidence of congressional consent.

As we have seen, this description of *Garamendi* may appear somewhat at odds with the question *Garamendi* actually posed. The Court’s reading, however, indicates that it had come to appreciate the fundamental threat to constitutional structure posed by a broad reading of *Garamendi* that gave preemptive effect to mere presidential policy. The Bush administration’s interpretation of *Garamendi* would convert the President into a unilateral lawmaker in foreign affairs. Drawing the line at executive agreements at least forced the President to gain the approval of a foreign nation; President Bush wanted to make law by memorandum.

As a result, *Medellín* imposes a strikingly limited reading upon *Garamendi*. Before *Medellín*, *Garamendi* could be read by both Presidents and academic critics as opening the door to a wide range of preemptive presidential acts, including unsettling the analyses and assumptions in *Barclays* and *Breard*.⁶⁸ But *Medellín* insisted that the key constitutional principles – that preemption can only come from a lawmaking source and that unadorned executive foreign policy is not such a source – survived *Garamendi*.⁶⁹ Thus *Medellín* made clear that a state law is protected from preemption even in the face of a conflicting presidential foreign policy that was, as the Court said, “plainly

66. *Medellín*, 552 U.S. at 531.

67. *Id.* at 531-32 (quoting *Dames & Moore*, 453 U.S. at 686).

68. See Denning & Ramsey, *supra* note 57, at 868-98.

69. See *Medellín*, 552 U.S. at 523-24.

compelling.”⁷⁰

V. MEDELLÍN AND THE “NEGATIVE ON STATE LAWS”

At this point, it may be useful to take a step back from recent cases to consider the broader constitutional structure. At the 1787 Convention in Philadelphia, James Madison pressed repeatedly to give Congress what he called a “negative” on (that is, a veto over) any state laws “which they [i.e., Congress] shd. judge to be improper.”⁷¹ Madison distrusted state legislatures but doubted that the Constitution itself could, or should, attempt to directly restrict all the harmful practices in which they might engage. Rather, through the “negative,” his idea was to give Congress a supervisory power over the states. This power, Madison thought, was essential to preserve an effective Union.⁷²

Madison, even at the time of the Convention, was no general foe of state power, despite his concerns. To those who feared the negative as a cover for consolidation of power in the national government, he presumably would have offered the following explanation. The negative would come with substantial procedural hurdles. It would carry the burdens of bicameralism and presentment. It would need to gain a majority in the Senate, whose members were, under the original Constitution, selected by the state legislators.⁷³ Any substantial effort to interfere with state prerogatives would be unlikely to survive.

Madison’s fellow delegates nonetheless defeated the negative, objecting in strong terms and voting it down on several occasions.⁷⁴ Given the closeness of the ratification vote in key states and the focus given in the ratification debates to the dangers of centralization at the expense of the states, one may speculate that had the negative been included, ratification might have been in great doubt. Ironically, though, the expansion of Congress’ legislative power, especially through the Court’s expansion of the

70. *Id.* at 524. It should be remembered – as *Medellin* noted – that the President does not lack a remedy. Presumably the President can almost always displace state laws implicating foreign affairs by secure passage of an act of Congress or approval of a self-executing treaty – that is, by acting through the procedure set forth in Article VI.

71. James Madison, *Notes, in* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., 1966).

72. *Id.*

73. U.S. CONST. art. I, § 3.

74. See Madison, *supra* note 71, at 22-23, 164-67.

Commerce Clause, means that today Congress exercises something very close to Madison's negative. Congress can invalidate a broad range of state laws simply by passing inconsistent legislation in areas where it has power to legislate. Moreover, the Seventeenth Amendment removed one protection of the states in the original design by making Senators directly elected instead of appointed by the states.

Despite these changes, scholars of federalism remain convinced of the (at least partial) efficacy of our constitutional system as a protection of federalism. The representation of the states in Congress (despite its dilution in the Seventeenth Amendment), and the relative difficulty of making federal law, formed the centerpiece of what Herbert Wechsler in a classic article famously called the "political safeguards of federalism."⁷⁵ As Bradford Clark has explained more recently:

The Founders understood that the means established for adopting federal law would have a direct impact on federalism. Some of the most potent safeguards of federalism, for example, derive from a surprising source: the Supremacy Clause. Although the Supremacy Clause performs the familiar function of securing the primacy of federal law over contrary state law, it also necessarily constrains the exercise of federal power by recognizing only three sources of law as "the supreme Law of the Land." The Founders, in turn, prescribed finely wrought and exhaustively considered procedures elsewhere in the Constitution to govern the adoption of each type of law recognized by the Supremacy Clause. . . . [F]ederal lawmaking procedures . . . preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism. The text, structure, and history of the Constitution, moreover, suggest that these procedures were meant to be the exclusive means of adopting "the supreme Law of the Land." Permitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority.⁷⁶

75. Herbert Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

76. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L.

The matter may also be explored from the framers' perspective on separation of powers. At the Convention, Madison's future co-author, Alexander Hamilton, expressed an idea even more unpopular than Madison's negative: that the United States should have an elective monarchy, with executive powers modeled fairly transparently on those of the English king.⁷⁷ Hamilton did not even bother putting his proposal to a vote. History has treated Hamilton unkindly in some respects with regard to this proposal, for Hamilton did not propose a simple re-creation of the English monarchy. He would have re-allocated significant powers to Congress, including, for example, the power to declare war; but Hamilton surely saw the English monarchy as his inspiration.

One thing Hamilton did not propose, however, was giving the executive the power to change law by decree. As noted above, this would have been an extraordinary change even from the perspective of the English model. What set England apart from the major eighteenth-century continental monarchies was that the English king was bound by law and was not himself a lawmaking authority.⁷⁸ Like the other key limit on English monarchical power—lack of power over expenditure—lack of lawmaking power forced the English king to cooperate with Parliament because the king had limited ability to govern on his own.

It is worth considering the extent to which executive preemption departs from these basic principles. Executive preemption would give the President the “negative” that Madison would have placed with Congress. In the version advanced by the Bush administration in *Medellín*, it would allow the President a supervisory power over state laws that the President found inconvenient to national policy. And the President could exercise this power without any of the political safeguards of federalism identified as crucial by Professors Clark and Wechsler.

To be sure, this power, as claimed by the President in *Medellín*, would only apply to matters that implicated the

REV. 1321, 1323-24 (2001) (footnotes and some internal quotations omitted); see also RAMSEY, *THE CONSTITUTION'S TEXT*, *supra* note 8, at 286-87.

77. See CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, *DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787*, at 76-77 (1986) (discussing Hamilton).

78. See *THE FEDERALIST* NO. 47 (James Madison), *supra* note 9, at 304.

President's foreign policies. But especially in the modern era in which "globalization" has become a cliché, the range of state policies potentially implicating foreign affairs seems substantial almost to the point of limitless. States' economic regulations increasingly raise international issues because of economic connectedness, as shown in *Barclays* and *Garamendi*. States' criminal laws increasingly raise international issues, not just because—as seen in *Breard* and *Medellín* itself—states come in contact with more foreign nationals, but also because international opinion has become more interested in how nations treat their own nationals. Thus, not only did Texas' treatment of a foreign national raise foreign policy issues in *Medellín*, but in several other cases international concern has been expressed over the way Texas treated its own citizens. There now seems to be no coherent line, if there ever was one, between local issues and international issues.

Similarly, executive preemption redistributes power among the federal branches. States acting contrary to the President's wishes, as Texas did in *Medellín*, are a check on the President's power. They are a direct check, of course, because they are an obstacle to the President achieving a particular goal. They are a broader check as well, because they force the President to enlist Congress' support to achieve goals, and Congress may exact a price in other areas. The more the President has power to clear obstacles unilaterally, the less a President is likely to forge a cooperative relationship with Congress.⁷⁹

Again, it may be objected that executive preemption applies only to foreign affairs, where we have traditionally accepted broader presidential initiative. This objection, however, seems to get matters backwards. To the extent we accept presidential initiative in foreign affairs, we are comforted by the fact that the President's power to impose domestic consequences of presidential foreign policy is limited. The President's broad diplomatic powers, for example, have little immediate effect locally. But that is because we place federal lawmaking power, including preemptive power, in other branches.

79. For an elaboration on the separation of powers implications of executive preemption, see Denning & Ramsey, *supra* note 57, at 898-915.

VI. CONCLUSION: *MEDELLÍN* AND *MOVSESIAN*

In conclusion, I will bring the discussion back to the *Movsesian* case and the broader issue of states seeking to provide remedies for international wrongs. Undeniably, such efforts may conflict with presidential foreign policy. Assuming the state remedies are otherwise constitutional, the question is whether the President's policy, standing alone, should displace state law.

The Ninth Circuit held in *Movsesian*, largely on the authority of *Garamendi*, that the President's policy with respect to the Armenian Genocide preempted California's law. We should see that the court got the first step right: it correctly described the issue as one of executive preemption.⁸⁰ We should also now see that, at minimum, its reliance on *Garamendi* an incomplete assessment. *Medellín* substantially rejected the broad reading of *Garamendi* proposed by the President, which is essentially the reading on which the Ninth Circuit relied.⁸¹ *Medellín* instead indicated that *Garamendi* should be limited to its facts—and to a limited version of its facts in which the executive agreements should be seen as the basis for preemption. In effect, it adopted Justice Ginsburg's dissent (although it viewed *Garamendi*'s facts differently than she did).⁸² Because there was no executive agreement in *Movsesian*, it was more akin to *Medellín* than *Garamendi*.⁸³ As a result, its uncritical reliance on *Garamendi* is

80. See *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1063 (9th Cir. 2009) ("California Code of Civil Procedure § 354.4 is preempted because it directly conflicts with the Executive Branch's foreign policy refusing to provide official recognition to the 'Armenian Genocide.'").

81. The Ninth Circuit described *Garamendi* as follows: "In *Garamendi*, the Supreme Court recognized for the first time that 'presidential foreign policy' itself may carry the same preemptive force as a federal statute or treaty. Unlike in previous cases, the presidential foreign policy was not contained in a single executive agreement. . . . In sum, the Court held that in the realm of foreign affairs, '[t]he exercise of the federal executive authority means that state law must give way where . . . there is evidence of clear conflict between the policies adopted by the two.'" *Id.* at 1056 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 394, 421-23 (2003)) (citations omitted)). This description is not necessarily inaccurate, but it is one that the Court rejected in *Medellín*. See *supra* Part IV.

82. That is, unlike Ginsburg's dissent, the *Medellín* majority saw the executive agreements in *Garamendi* to be preemptive.

83. To be clear, the mere existence of an executive agreement should not automatically establish preemption, either under the Court's view or under basic constitutional principles. Substantial scholarship has questioned the fundamental basis of preemption by executive agreement or called for its sharp limitation. See Ramsey, *Executive Agreements*, *supra* note 48, at 218-235; David Sloss, *International Agreements*

problematic.

Further, the Ninth Circuit did not grapple with the basic constitutional principles set forth in *Youngstown* and reaffirmed in *Medellín*. *Medellín* makes two things clear: Justice Black's simple proposition—that the President is not a lawmaker—retains its vitality; and that proposition rejects the broad view of executive preemption. Preemption is lawmaking. That is the fundamental message of both *Youngstown* and *Medellín*.

There may be a more limited way to defend *Movsesian*'s result, though ultimately I find it unavailing. As discussed, limiting executive preemption to foreign affairs is no limit, because almost everything may affect foreign affairs, and if the President claims that something affects foreign affairs, the courts are ill-suited for second-guessing. Perhaps, though, one might say that courts could and should undertake a balancing test, assessing the relative strengths of the state's interest and the foreign affairs interest. Matters within states' traditional areas of regulation—criminal law (*Medellín*), property (*Youngstown*), or tax (*Barclays*)—might be more defensible than state attempts to right international wrongs (*Garamendi*, *Movsesian*). Indeed, in a companion case to *Movsesian*, *Von Saher v. Norton Simon Museum*, the Ninth Circuit adopted something like this test to assess arguments of constitutional preemption under *Zschernig v. Miller*.⁸⁴

This approach to executive preemption seems mistaken for at least two reasons. The Supreme Court's cases suggest categorical rules, not balancing. *Medellín* and *Youngstown* are categorical in rejecting executive preemption, not in particular contexts, but on broad constitutional principles. It is true that *Garamendi* can be read to invite a balancing test,⁸⁵ but *Medellín* declined to take that route, even though such an approach offered a possible alternative way to distinguish *Garamendi*. Instead, the Court rested on the categorical distinction between executive agreements and mere executive foreign policy. Second, there are good reasons to think

and the Political Safeguards of Federalism, 55 STAN. L. REV. 1963 (2003); Clark, *supra* note 57; Van Alstine, *supra* note 57.

84. *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009); *Zschernig v. Miller*, 389 U.S. 429 (1968) (recognizing a "dormant" foreign affairs power that excluded certain state activities even in the absence of a conflicting federal policy).

85. See Denning & Ramsey, *supra* note 57, at 925-36.

the balancing approach unworkable. No useful standards exist to identify what is or is not within a state's interest, and much will depend on debatable descriptions of the state law's purpose in particular cases. For example, the law at issue in *Garamendi* might seem within the state's interest if that interest is described (as California described it) as assuring that insurance companies operating in California treat policyholders fairly. The Supreme Court in *Garamendi* denigrated California's interest by redescribing it as an attempt to force a particular result upon overseas claims. Neither description seems indisputably correct, and indeed the law may seem to contain a bit of both. And even with respect to overseas claims, one might think that states have an interest in securing justice for their own citizens. It seems likely that almost any such case would turn more upon judicial intuition than upon any predictable test. These concerns likely led the *Medellín* Court away from attempts at balancing and instead toward a reaffirmation of basic constitutional principles.

In sum, the Constitution establishes two clear rules. One, state law prevails unless federal law displaces it. Two, the President alone cannot make federal law. If the President wants state law displaced because it conflicts with presidential foreign policy, the Constitution prescribes two routes by which the President may achieve that result: by the approval of Congress or (in the case of a treaty) the approval of a supermajority of the Senate. In *Youngstown* and again in *Medellín*, the Court reminded the President of the rules. And those rules should apply as well where states seek to remedy international wrongs – even where that proves inconvenient to the President.

